Public Prosecutor v Reza Mohd Shah bin Ahmad Shah

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-10 OF 2001
AUGUSTINE PAUL J
27 AUGUST 2002

Criminal Law *— Dangerous drugs — Trafficking — Presumption — Possession of dangerous drugs — Whether there was evidence to show that the accused had possession of the drugs by merely holding a bag containing the drugs — Whether prosecution had made out a prima facie case and proved its case beyond reasonable doubt against the accused — Dangerous Drugs Act 1952 s 37(da)*

The accused was charged with an offence of trafficking in dangerous drugs. He claimed trial to the charge. Briefly stated, the facts of the case was that on 14 August 2000, Inspector Mohamad Alpiyang bin Ali ('PW2') led a party of police to a reserve land near the railway track at Pantai Dalam, Kuala Lumpur. They stationed themselves near some squatter houses there. PW2 said that they observed the accused walking suspiciously from the railway track towards them. He saw the accused carrying a plastic bag ('exh P3') in his right hand. The accused was about ten metres away at that time. There was no one else there. The accused tried to enter the reserve land through a hole in a fence, which separated the reserve land from the railway track. PW2 shouted 'Police' at the accused that was then about three metres away from him. The accused ran immediately and threw the bag that he was carrying. PW2 took possession of the bag from where it was thrown. The accused contended that mere holding of exh P3 did not mean that he was trafficking in it. In any event, the accused said that he was not in possession of exh P3 as it had been put to PW2 that the accused was not carrying it. He also said that the credibility of PW2 was questionable, as he had said that he had initialled the exhibits before handing them to PW5 while PW5 had said that the exhibits were initialled in his presence.

Held, convicting the accused:

(1) In his evidence, PW2 said that he handed over the exhibits to PW5 after he had placed markings on them. On the other hand, PW5 said that the exhibits were marked by PW2 in his presence. The court agreed that there was a contradiction. However, it did not cast any doubt in the chain of custody of the exhibits from the time they were seized until they were produced in court. What was produced in court was what was seized at the scene. In fact, none of the witnesses was cross-examined on the issue. In the circumstances, the difference in the evidence in this area was not material and did not affect the substance of the testimony of PW2 (see p 18D–F).

(2) The court is entitled to infer knowledge on the part of a person on the assumption that such a person has the ordinary understanding expected of him. The court is not concerned with the knowledge

of a reasonable man but with reasonable inferences to be drawn from a situation. There are many circumstances from which knowledge can be inferred. One instance is the inference to be drawn from the act of a person in absconding or fleeing from the scene of a crime (see p 20B–C).

(3) The fact that the accused was carrying exh P3 with its contents followed by the speed at which he ran and threw it upon being confronted showed that there was a clear nexus between his conduct and the offence in question. He wanted to part possession with what constituted the offence. It was a clear indication of his guilty mind. This was sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in exh P3. As the cannabis weighed more than 200g, the presumption contained in s 37(da) of the Dangerous Drugs Act 1952 must therefore be invoked. The accused was thus presumed to have been trafficking in the drugs. This meant that the prosecution had made out a prime facie case against the accused (see pp 23B–C, 24G).

(4) In the circumstances and judged against the background of the facts of the case, the court was unable to accept the defence advanced by the accused. He had therefore not succeeded in rebutting the presumption raised against him. Neither had he raised any reasonable doubt to show that he was not in possession of exh P3 at the material time. The court was therefore satisfied that the prosecution had proved its case against the accused beyond reasonable doubt. Accordingly, the court found him guilty and sentenced him to death (see pp 25H–26A).

[Bahasa Malaysia summary

Tertuduh dipertuduh dengan kesalahan mengedar dadah berbahaya. Dia menuntut perbicaraan terhadap pertuduhan. Secara ringkas, fakta kes adalah bahawa pada 14 Ogos 2000, Inspektor Mohamad Alpiyang bin Ali ('SP2') telah mengetuai sepasukan polis ke tanah rizab berhampiran lintasan jalan keretapi di Pantai Dalam, Kuala Lumpur. Mereka mengambil kedudukan berhampiran beberapa rumah setinggan di sana. SP2 berkata bahawa mereka memerhati tertuduh berjalan dalam cara yang membangkit rasa syak wasangka dari lintasan jalan keretapi menuju ke arah mereka. Beliau nampak tertuduh membawa suatu beg plastik ('eksh P3') dengan tangan kanannya. Tertuduh berada kira-kira sepuluh meter darinya pada masa itu. Tiada orang lain di sana. Tertuduh cuba memasuki tanah rizab melalui satu lubang dalam pagar, yang mengasingkan tanah rizab daripada lintasan jalan keretapi. SP2 menjerit 'Polis' kepada tertuduh yang berada kira-kira tiga meter darinya. Tertuduh terus lari dan mencampak beg yang dibawanya. SP2 memperolehi beg itu dari tempat ia dibuang. Tertuduh berhujah bahawa memegang eksh P3 semata-mata tidak bermakna bahawa ia mengedarnya. Walau

bagaimanapun, tertuduh berkata bahawa ia tidak memiliki eksh P3 kerana ia dikemukakan kepada SP2 bahawa tertuduh tidak membawanya. Ia juga berkata bahawa kebolehpercayaan SP2 diragukan, kerana ia telah mengatakan bahawa dialah orang yang menanda dengan nama singkatan nama sendiri ekshibit-ekshibit sebelum menyerahkannya kepada SP5 manakala SP5 berkata bahawa ekshibit-ekshibit tersebut telah ditanda dengan singkatan nama dalam kehadirannya.

Diputuskan, menyabitkan tertuduh:

(1) Dalam keterangannya, SP2 berkata bahawa beliau telah menyerah ekshibit-ekshibit kepada SP5 setelah beliau meletak tanda-tanda pada mereka. Sebaliknya SP5 berkata bahawa ekshibit-ekshibit telah ditanda oleh SP2 dalam kehadirannya. Mahkamah bersetuju bahawa ini merupakan satu percanggahan. Namun demikian, ia tidak mewujudkan apa-apa keraguan dalam rangkai kawalan ekshibit dari masa mereka dirampas sehinggalah masa dikemukakan di mahkamah. Apa yang dikemukakan di mahkamah merupakan benda yang dirampas di tempat kejadian. Pada hakikatnya, tidak seorang pun daripada saksi diperiksa balas atas isu ini. Dalam keadaan ini, perbezaan dalam keterangan dalam perkara ini tidak material dan tidak menjejaskan dasar keterangan SP2 (lihat ms 18D–F).

(2) Mahkamah berhak membuat inferens pengetahuan terhadap pihak seseorang atas anggapan bahawa orang demikian memiliki kefahaman biasa yang dijangkakan. Mahkamah tidak mengendahkan pengetahuan seorang munasabah tetapi dengan inferens munasabah yang boleh dibuat dari sesuatu keadaan. Pelbagai keadaan wujud dari mana pengetahuan boleh dibuat inferens. Satu contoh adalah inferens yang boleh dibuat dari perbuatan seseorang dalam melarikan diri dari tempat kejadian jenayah (lihat ms 20B–C).

(3) Hakikat bahawa tertuduh membawa eksh P3 dengan kandungannya disusuli dengan kelajuan yang mana ia lari dan mencampakkannya apabila bersemuka menunjukkan bahawa wujudnya perkaitan yang nyata di antara kelakuannya dan kesalahan berkenaan. Ia ingin berpisah dengan apa yang membentuk kesalahan tersebut. Ini jelas menunjukkan keadaan salah mindanya. Ini adalah mencukupi untuk membuat inferens bahawa tertuduh tahu tentang kewujudan dadah berbahaya dalam eksh P3. Oleh kerana berat kanabis melebihi 200g, anggapan yang termaktub dalam s 37(da) Akta Dadah Berbahaya 1952 dengan itu mestilah timbul. Justeru itu, tertuduh dianggap telah mengedar dadah itu. Ini bermakna bahawa pihak pendakwaan telah membukti satu kes prima facie terhadap tertuduh (lihat ms 23B–C, 24G).

(4) Dalam keadaan demikian dan dilihat berdasarkan latar belakang fakta-fakta kes, mahkamah tidak boleh menerima pembelaan yang dibentangkan oleh tertuduh. Dengan itu, ia tidak berjaya menyangkal anggapan yang dibangkitkan terhadapnya. Dia tidak juga membangkitkan apa-apa keraguan munasabah untuk menunjukkan bahawa ia tidak memiliki eksh P3 pada masa material. Maka mahkamah puas hati bahawa pihak pendakwaan telah membukti kesnya terhadap tertuduh melampaui keraguan munasabah. Oleh itu, mahkamah mendapatinya bersalah dan menjatuhkan hukuman mati (lihat ms 25H–26A).]

Notes

For cases on Dangerous Drugs Act 1952 s 37(da), see 4 *Mallal's Digest* (4th Ed, 200 Reissue) paras 97–104.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Chan Kwok Keung & Anor v The Queen [1990] 1 CLJ 411 (refd)
Director of Public Prosecutions v Wishart Brooks [1974] AC 862 (refd)
Mohamed Ali v PP [1962] MLJ 230 (refd)
Neo Koon Cheo v R [1959] MLJ 47 (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Letchumanan [2000] 4 MLJ 449 (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401 (refd)
PP v Phua Keng Tong [1988] 2 MLJ 279 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)

Appeal from: Arrest Case No B81–22 of 2000 (Magistrate's Court, Kuala Lumpur)

Azhar bin Abdul Hamid (Deputy Public Prosecutor, AG's Chambers) for the prosecution.

Ameenuddin Ibrahim (*Ameen & Co*) for the accused.

Augustine Paul J: The accused was charged with an offence of trafficking in dangerous drugs in the following terms:

> Bahawa kamu pada 14 Ogos 2000 jam lebih kurang 12.15 tengahari, di kawasan tanah rezab jalan keretapi, Jalan Pantai Dalam, Brickfields, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 795.3g kanabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

A He claimed trial to the charge. Briefly stated, the facts of the case are that on 14 August 2000, Inspector Mohamad Alpiyang bin Ali ('PW2') led a party of police officers consisting of detectives Abdul Halim bin Hj Man, Razak bin Abdul Majid and Manokaran to a reserve land near the railway track at Pantai Dalam, Kuala Lumpur. They stationed themselves in the vicinity of some squatter houses there. PW2 said that they observed the B accused walking suspiciously from the railway track towards them. He saw the accused carrying a plastic bag ('exh P3') in his right hand. The accused was about ten metres away at that time. There was no one else there. The accused tried to enter the reserve land through a hole in a fence which separated the reserve land from the railway track. PW2 shouted 'Police' at the accused who was then about three metres away from him. The accused C ran immediately and threw the bag that he was carrying. PW2 took possession of the bag from where it was thrown. He said that he is sure that it is the bag that the accused threw. Detective Abdul Halim bin Hj Man chased the accused, arrested him and brought him to PW2. PW2 opened the bag. As he then said:

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> Hasil pemeriksaan beg plastik itu yang saya jalankan di dalamnya terdapat dua bungkusan keratan akhbar. Setiap satu bungkusan dibungkus dengan tiga helaian keratan akhbar. Di dalamnya terdapat satu bungkusan plastik yang berisi tumbuhan-tumbuhan kering yang saya syaki dadah ganja.
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> Saya telah mengarahkan Det/Sjn Halim untuk menggari suspek dan jalankan pemeriksaan ke atas badannya. Tiada barang salah lain yang dijumpai.

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The accused and the exhibits were then brought to the Brickfields Police Station. The two packets containing what was suspected to be dangerous drugs were marked as exhs P6 and P7. In his cross-examination, PW2 disagreed that the accused was not carrying exh P3. He also denied that he F did not make any observation as testified by him. He then said:

> Semasa mengenalkan diri sebagai polis, saya berada di kawasan sampah yang terbakar. Saya setuju ada banyak sampah di tempat itu. Apabila OKT hendak melarikan diri beliau terus melepaskan beg plastik tersebut. Saya tidak setuju saya tidak boleh nampak OKT lepaskan beg plastik. OKT membuang beg plastik di tepi pagar. Tidak benar OKT ditangkap oleh Sjn Halim dan selepas ditangkap dibawa ke tempat itu untuk cari sesuatu. Tidak benar OKT dipukul oleh Sjn Halim. Saya tidak setuju OKT tidak berlari dan tidak buang beg plastik.

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In his re-examination PW2 said:

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> Apabila saya nampak tertuduh melepaskan beg plastik itu pandangan saya tidak terlindung oleh pagar atau pun semak. (Saksi dirujuk kepada ID10A) Pandangan saya dari sini ke landasan keretapi tidak terlindung. Tidak ada tandas di kawasan itu. Sjn Halim tangkap OKT dalam kawasan E di ID8. OKT tiada dipukul.

Chong Yong Kiong ('PW4') is a chemist attached to the Chemistry I Department, Petaling Jaya. He analyzed the contents of exhs P6 and P7 and found them to contain 795.3g of cannabis as defined in s 2 of the Dangerous Drugs Act 1952. Inspector Benedictson Avina ak Jekes ('PW5') and

Inspector R Azizan bin Ibrahim ('PW1') testified on the custody of the exhibits after they were handed over to them. A

In his submission at the close of the case for the prosecution, learned counsel for the accused contended that merely because the accused was holding exh P3 does not mean that he was trafficking in it. In any event, he said, the accused was not in possession of exh P3 as it had been put to PW2 that the accused was not carrying it. He also said that the credibility of PW2 is questionable as he had said that he had initialled the exhibits before handing them to PW5 while PW5 had said that they were initialled in his presence. He also said that the direction from which the accused allegedly came meant that PW2 could not have seen him clearly because of the undergrowth. In his submission, the learned deputy public prosecutor said that the contradiction with regard to the marking of the exhibits is not material. He said that the fact the accused was carrying exh P3 for some distance meant that he had custody of it. The accused's knowledge of the contents of exh P3 is established by the acts of the accused in dropping it and running away. Hence, the learned deputy public prosecutor said, there is direct evidence of possession. He then said that as the cannabis weighed more than 200g, the presumption of trafficking is triggered. B C D

I shall first deal with the credibility of PW2 in relation to the different points of time at which he had initialled the exhibits. In his evidence, PW2 said that he handed over the exhibits to PW5 after he had placed markings on them. On the other hand, PW5 said that the exhibits were marked by PW2 in his presence. I agree that this is a contradiction. But it does not cast any doubt in the chain of custody of the exhibits from the time they were seized till they were produced in court. What was produced in court is what was seized at the scene. As a matter of fact none of the witnesses were cross-examined on this issue. In the circumstances, it is my view that the difference in the evidence in this area is not material and does not affect the substance of the testimony of PW2. The submission by learned counsel that the accused was not in possession of exh P3 as it had been put to PW2 that the accused was not carrying it cannot be sustained. As I said in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 121: E F

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. In this regard, it was observed in *Emperor v Karimuddi Sheikh* 1932 AIR Cal 375: G
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> > 'Mere suggestions by a pleader or advocate for the accused do not amount to evidence of the fact suggested, unless they are either partly or wholly accepted by the witness for the prosecution.' H

As PW2 had denied the suggestion put to him, it cannot be considered as evidence at this stage. It is only an indication of the defence to be advanced by the accused. The further submission that PW2 could not have seen the accused clearly is negatived by his evidence that he did in fact see the accused clearly. In the circumstances, I am unable to hold that the credibility of PW2 is questionable. On the contrary, his evidence is credible. I

A It is now appropriate to consider whether the prosecution had made out a prime facie case against the accused. On the facts of this case, the prosecution must establish that the accused was in possession of the dangerous drugs before the issue of trafficking in them can arise for consideration. In order to prove possession, the prosecution must show that the accused had custody or control of the dangerous drugs and that he had B the required knowledge of the thing possessed. Custody or control can be proved by direct evidence or by drawing inferences from proved facts. As I said in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 in reliance on cases such as *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 and *Public* C *Prosecutor v Phua Keng Tong* [1988] 2 MLJ 279, proof of knowledge is very often a matter of inference. The inference can be drawn from proved facts or as provided by law. In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, I expressed the view that every effort must be made to prove knowledge by direct evidence before resort can be had to a presumption provided by law. In support, I refer to *Mohamed Ali v Public Prosecutor* [1962] MLJ 230 D where Ong J (as he then was) said at p 232:

> Presumptions of fact must not be drawn automatically, or as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin LJ said recently in *Berry v British Transport Commission* [1961] 3 WLR 450, 463:
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> > '... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable — in the sense that 'estoppels are odious', and the 'doctrine' should never be applied without a necessity for it'; per Bramwell LJ *Baxendale v Bennett* (1878) 3 QBD 525, at p 529 — because they prevent the court from ascertaining the truth, which should be the prime object of a judicial F investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.'

With regard to proof of knowledge from facts that have been established, I consider it necessary to repeat what Thean J (as he then was) said in *Public* G *Prosecutor v Phua Keng Tong* [1986] 2 MLJ 279 at p 286:

> However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In the case of *RCA Corp v Custom Cleared Sales Pty Ltd* (1978) FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p 478, 'Except where a party's own H statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case.'
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> And the court further said, at p 579:
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> > 'It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on I the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the

> court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.'

Thus, in drawing inferences from proved facts, the court is entitled to infer knowledge on the part of a person on the assumption that such a person has the ordinary understanding expected of him. The court is not concerned with the knowledge of a reasonable man but with reasonable inferences to be drawn from a situation. There are many circumstances from which knowledge can be inferred. One instance is the inference to be drawn from the act of a person in absconding or fleeing from the scene of a crime. In dealing with this issue, I said in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at pp 721–722:

> A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v State* (1996) Cri LJ 2201). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid*'s case). For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v The Queen* (1990) 1 CLJ 411 at p 413:
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> 'It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr Duckett QC on behalf of the crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.
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> In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had been made by the police to find them and with what result. Leung, in his statement to the police after his arrest, gave them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result. It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.

> In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question. In this case the prosecution produced no evidence to establish that either of the appellants had been hiding away or otherwise behaving in an unusual manner to this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.'

Evidence of such conduct can be explained away by the accused as provided by s 9 of the Evidence Act 1950 (see *Ling Ngan Liong v PP* [1964] MLJ 20; *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423). However, the onus is on the accused to explain his conduct. Thus, in *Mansor bin Mohd Rashid*'s case, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v R* AIR 1941 Orissa 517).

The manner of proving knowledge by drawing inferences can be seen in cases such as *Director of Public Prosecutions v Wishart Brooks* [1974] AC 862 and *Neo Koon Cheo v R* [1959] MLJ 47. In *Director of Public Prosecutions v Wishart Brooks*, a number of police officers saw a van with its engine running parked on a lay-by near an airstrip. On the approach by the police officers, the respondent, who was the driver, and others who were in the cab of the van attempted to run away. The respondent was caught by the police. In the body of the van, which was neither visible nor accessible from the cab, were 19 sacks containing over 1,000 pounds of ganja. The respondent's conviction was quashed by the Jamaican Court of Appeal on the ground that it was not shown that he had more than mere custody or charge of the van and its contents and that there was no evidence that he had possession of the ganja. The Privy Council, in allowing the appeal, held that the technical doctrines of the civil law about possession were irrelevant to this field of criminal law and added at pp 866–867:

> In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal status as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which bring about the separation of property and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in *Reg v Livingston* (1952) 6 JLR 95 it is, in their Lordship's view, wrong. These

technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only actus reus required to constitute an offence under s 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The mens rea by which the actus reus must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3). A

Upon the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van. B C

In *Neo Koon Cheo v R*, a raid was made by a detective sergeant, a detective corporal and a detective on the attic of No 26, New Bridge Road, on 21 January 1958 at about 8.20pm. On entering the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination, the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. In holding, in the alternative, that the evidence was sufficient to make a case against the appellant for possession of prepared opium and smoking utensils, Ambrose J said at p 50: D E

If my interpretation of s 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under s 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic, it must be presumed, until the contrary is proved, under s 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless, the presumptions under s 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to-be in possession of the chandu and chandu dross. F G H

The evidence of PW2 shows that the accused was carrying exh P3 for some distance. When PW2 shouted 'Police', the accused ran and threw it. PW2 then picked it up. It contained the dangerous drugs. The fact that the accused was carrying exh P3 and that he threw it when confronted clearly shows that he had custody and control of it together with what it contained. The remaining matter for consideration is whether he had knowledge that he was carrying the dangerous drugs in respect of which he had been I

charged. As proof of knowledge is very often a matter of inference, the conduct of the accused prior to his arrest is brought into sharp focus. He ran and threw exh P3 when PW2 shouted 'Police'. In *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411, referred to in a passage from *Public Prosecutor v Chia Leong Foo* which I have reproduced earlier, it was held that in order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question. The facts reveal that the accused had custody and control of exh P3 at the material time. It contained the dangerous drugs which formed the offence alleged against him. When the word 'Police' was shouted he immediately ran and threw it. The fact that the accused was carrying exh P3 with its contents followed by the speed at which he ran and threw it upon being confronted show that there is a clear nexus between his conduct and the offence in question. He wanted to part possession with what constituted the offence. It is a clear indication of his guilty mind. This is sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in exh P3. I pause to add that the facts of this case must be contrasted with those in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1, *Public Prosecutor v Letchumanan* [2000] 4 MLJ 449 and *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 where the flight of the accused was found to be of no consequence as there was no nexus between the dangerous drugs seized and the conduct of the accused. The inference drawn in this case that the accused had knowledge of the existence of the dangerous drugs does not suggest that he knew that it was cannabis. With regard to the extent and nature of knowledge of the dangerous drugs that the prosecution must prove, I consider it necessary to reproduce what I had said in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* at pp 420–421:

> It must be observed that in proving this element the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference, of the existence of the dangerous drug but not its qualities. This stand has been consistently taken by the Singapore Courts following *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 which was approved in *Tan Ah Tee & Anor v PP* [1980] 1 MLJ 49. It is sufficient for me to refer to *Sim Teck Ho v PP* [2000] 4 SLR 39 where Yong Pung How CJ said at pp 42–43:
>
> > 'The appellant was charged with trafficking in a controlled drug, an offence under s 5(1)(a) of the Misuse of Drugs Act (Cap 185) ('the Act'). Section 5(2) of the Act states that a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking. Section 17(c) of the Act provides a presumption concerning trafficking. It states that any person proved to have possession of more than 2g of diamorphine shall be presumed to have that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.
> >
> > The key issue in this appeal was whether the trial judge was right in finding that the appellant was in possession of the diamorphine contained in the bag. Numerous cases have established that possession encompasses

the element of physical control as well as an element of knowledge. For example, in *Fun Seong Cheng v PP* [1997] 3 SLR 523, it was said by Karthigesu JA, in delivering the judgment of the Court of Appeal:

> "53 ... Clearly in order to prove that the appellant was in possession, he must have physical control over the drugs. It is a matter of fact whether someone had physical control over an item ...
>
> 54 Physical control is not enough for the purpose of proving possession. There needs to be mens rea on the part of the accused."

Karthigesu JA went on to cite a portion of Lord Pearce's judgment in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, a decision of the House of Lords which involved the meaning of 'possession' for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964. Lord Pare's dicta had been cited in extensio with approval by the Court of Appeal in *Tan Ah Tee & Anor v PP* [1978–1979] SLR 211; [1980] 1 MLJ 49. Wee Chong Jin CJ in delivering the judgment of the court, said that the word 'possession' for the purpose of the Act should be construed as Lord Pearce had construed it. His Lordship had said in *Warner* at p 305:

> 'One may, therefore, exclude from the 'possession' intended by the Act the physical control of articles which have been 'planted' on him without his knowledge. But how much further is one to go? If one goes to the extreme length of requiring the prosecution to prove that 'possession' implies a full knowledge of the name and nature of the drug concerned, the efficacy of the Act is seriously impaired, since many drug pedlars may in truth be unaware of this. I think that the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse.'

Therefore, in order to prove possession, the prosecution must prove that there is first, physical control over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name nor nature of the drug.

Thus, it is not necessary for the prosecution to prove that the accused had knowledge of the nature of the drugs. It follows that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis. However, there is no further evidence to show that he was trafficking in the dangerous drugs. As the cannabis weighed more than 200g, the presumption contained in s 37(da) of the Dangerous Drugs Act 1952 must therefore be invoked. The accused is thus presumed to have been trafficking in the drugs. This means that the prosecution has made out a prime facie case against the accused. Accordingly, I called upon him to enter his defence to the charge preferred against him. The three alternatives were explained to the accused. He elected to give evidence on oath.

In substance, the defence of the accused is that he was not carrying exhs P3 and that PW2 was not at the scene. As he said in his evidence:

> Saya berjalan ke arah landasan keretapi untuk pergi ke gerai makan. Reban ayam di sini saya punya. Saya dari kawasan depan bengkel melalui lorong yang ada anak panah. Kemudian saya melalui lorong tepi reban ayam menuju ke tandas untuk cuci tangan saya. Selepas itu, saya menuju ke kawasan pagar

yang berlubang. Saya keluar melalui pagar berlubang itu. Kemudian seorang lelaki berumur dalam 35 tahun panggil saya. Kemudian dia terus memegang saya. Apabila orang itu panggil saya, dia ada di belakang saya. Lebih kurang dalam jarak 10–11 meter. Beliau dengan seorang lain. Dia terus memegang saya. Dia terus menggari saya. Baru dia memperkenalkan diri. Mereka anggota polis. Pada masa itu, saya tidak memegang apa-apa barang. Kemudian dua anggota polis memukul saya. Dua anggota polis ini tidak ada memberi keterangan dalam kes ini. Mereka tanya saya di manakah barang. Saya tidak tahu apa barang yang mereka maksudkan. Kemudian salah seorang dari anggota polis itu menunjuk kepada longgokan sampah. Dia mengambil satu bungkusan plastik berwarna putih jernih lutsinar. Jarak di antara tempat saya dan longgokan sampah lebih kurang 8–9m. Anggota polis pergi terus dan mengambil barang itu. (Saksi dirujuk kepada P10). Gambar A dan D ialah kawasan sampah.

Selepas barang diambil, dia membawa saya menuju ke depan kawasan bengkel. Kemudian salah seorang anggota polis mengeluarkan telefon bimbit dan membuat satu panggilan. Dalam masa 15 minit, dua kereta datang. Satu kereta Proton Perdana berwarna hijau. Satu lagi Proton Saga berwama biru. Dari Perdana keluar seorang. Dari Proton Saga, dua orang keluar. Kemudian dia mengambil saya dan letak saya dalam kereta Proton Saga. Saya diambil ke Balai Polis Brickfields. Perkara seperti yang dikatakan oleh SP2 tidak berlaku. Saya nampak SP2 di depan kawasan bengkel sahaja. Dia yang membawa kereta Perdana. Dia keluar dari kereta itu. Jarak dari tempat saya ditangkap ke tempat bengkel lebih kurang 60m. Dari tempat bengkel tidak boleh nampak tempat yang saya ditangkap. Sebab ia terlindung di belakang reban ayam dan semak-semak samun. Orang dari bengkel buang sampah di tempat sampah itu.

Pada masa itu, ada pekerja lain yang menuju ke kawasan yang sama. Tidak benar tangkapan berlaku pada 12.00 tengah hari.

The testimony of the accused that PW2 was not at the scene was not put to him in the course of his cross-examination. That, on its own, does not mean that this part of the defence must be rejected. As Edgar Joseph Jr FCJ said in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 218:

> ... it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

Ordinarily, it may have been necessary for the prosecution to have recalled PW2 for the purpose of rebutting this part of the evidence of the accused. However, PW2 was cross-examined at length on the basis that he was at the scene. As he had given affirmative evidence of his presence at the scene there was no need for him to have been recalled for the purpose of rebutting what he had already confirmed. In the circumstances and judged against the background of the facts of the case, it is my view that this part of the evidence of the accused is a concoction. This casts doubt on the credibility of his evidence that he was not carrying exh P3. It is also in the nature of a bare denial. Thus, I was unable to accept the defence advanced by the

accused. He had therefore not succeeded in rebutting the presumption raised against him. Neither has he raised any reasonable doubt to show that he was not in possession of exh P3 at the material time. I was therefore satisfied that the prosecution had proved its case against the accused beyond reasonable doubt. Accordingly, I found him guilty. I imposed the only sentence allowed by law, that is to say, the sentence of death. I further directed that the accused be hanged by the neck till he is dead.

Accused convicted.

Reported by Peter Ling